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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. GARY BRUCE LYONS, Defendant and Appellant.	D054955 (Super. Ct. No. RIF119685)

APPEAL from a judgment of the Superior Court of Riverside County, Helios J. Hernandez, Judge. Affirmed.

A jury convicted Gary Bruce Lyons of first degree murder (Pen. Code,[1] § 187) and found true allegations the murder was committed by lying in wait (§ 190.2, subd. (a)(15)), and he personally and intentionally discharged a firearm causing death (§ 12022.53, subd. (d)). The trial court sentenced Lyons to prison for life without the possibility of parole consecutive to a 25-year-to-life term for the firearm enhancement.

1 All statutory references are to the Penal Code unless otherwise specified.

Lyons appeals, contending the trial court committed prejudicial error by admitting into evidence an audiotape of a jail phone call under Evidence Code section 1230 (declaration against penal interest exception to hearsay rule) because the declarant was not shown to be unavailable, in instructing the jury under erroneous CALCRIM jury instructions (CALCRIM Nos. 200, 220, 370, 521, 728), and in failing to instruct under other jury instructions (CALCRIM Nos. 640/641, 416, 418, 316). Lyons additionally asserts the prosecutor committed 22 instances of misconduct, which considered together, denied him due process and a fair trial, and claims his trial counsel provided ineffective assistance by failing to object to certain evidence, by failing to impeach several witnesses, by failing to request certain instructions or modifications to instructions, and by failing to object to the prosecutor's misconduct during closing argument. We find no prejudicial error on this record and affirm.

FACTUAL BACKGROUND

On August 4, 2004, at about 10:42 p.m., Riverside County Sheriff's deputies arrived at a remote area of Garcia Road, known as "the stretch" on the Morongo Indian Reservation in response to a 911 call that the body of a young woman was lying in the road. The deputies determined that the woman, who had a large amount of blood pooled around her face and head and trailed along her body to her knees, was dead. She had two gunshot wounds near her chin and another to the left side of her head. A bullet fragment and another bullet projectile were found near her body. Due to the blood pooling, body position and projectiles, the deputies believed the woman had been shot at that location while she was in an upright position. Because there was a lack of blood spatter near her,

the deputies also believed there might have been something behind the victim, like a car, when she was shot.

An autopsy revealed that any one of the three gunshot wounds to the woman's head and neck could have caused her death. One had entered her neck below her chin, passing through the hyoid bone and then fragmenting through her spine, severing the cervical spinal cord and continuing through her cerebellum before exiting the skull near the back of her head. Another went through her chin, fracturing several teeth and her jawbone before going through her tongue, roof of her mouth and the base of her skull before exiting out the back of her head. The third shot struck the back of the woman's head, traversed through her brain and exited above her left ear. Stippling burns surrounding several of the gunshot wounds suggested that the woman was shot at very close range and the soot in the chin wound suggested the barrel of the gun had been pressed directly to her chin when it was fired.

An examination of the bullet projectiles and fragments found at the scene and removed from the woman's body revealed they were most likely fired from the same gun, which was either a .38 special or a .38 super auto handgun.

The next evening, after getting a phone call that the young woman's body might be that of her 18-year-old daughter, Leticia Carrillo contacted a sheriff's deputy at a nearby substation to determine whether the body was in fact that of her daughter Sylvia Olmos. Carrillo explained that Olmos had a tattoo of the name "Letty" on one of her legs and a scar from some surgery on her stomach, that she had last talked with Olmos at about 9:00 p.m. on August 4, 2004, and that Olmos had been staying with a friend named Jeaneva

Davila in Banning for about a week before the body was discovered. On August 6, 2004, Carrillo positively identified a photo taken of the young woman's body as that of her daughter Olmos.

That same day, an investigator contacted Davila who reported that on August 4, 2004, at about 8:00 p.m., as she and Olmos were taking a walk, Lyons, along with a passenger, drove up in his silver or white car, later identified as a Mitsubishi Galant (Galant), and told Olmos that her in-custody boyfriend, John Paul Nelson, had called for her earlier and was going to call her later at Lyons's apartment. Olmos got into Lyons's car and they drove off in a direction away from his apartment. Later that night, at around 9:30 p.m., Davila called Olmos on her cell phone and they talked for about 11 minutes. Olmos sounded normal and told Davila she would be home soon. Lyons also talked with Davila during the conversation. When Olmos did not return to Davila's home, Davila tried to call her several more times that night, but no one answered.

On August 18, 2004, Lyons, who had been arrested on another matter, was interviewed concerning his involvement in this case. He told the investigator he had heard that Olmos, who had been his cousin Nelson's girlfriend, had been found dead on the "stretch." He admitted he had been hanging out with Olmos since Nelson had been incarcerated and they had been "messing around, a couple of days before what happened, happened." He confirmed he had picked up Olmos in his car after seeing her walking with Davila on August 4, 2004, explaining that they had gone to his apartment where they used drugs and had sex. Lyons claimed Olmos left his apartment with two people

named Brian Reynolds and Yvonne Gordin and that he had given his car to a friend named "White Girl."

On August 19, 2004, Lyons's white Galant was located parked in front of a residence on the Morongo Indian Reservation and seized. During the seizure, one of the investigators contacted Angela Woodworth whose nickname is "White Girl" as she came out of the house. She told the investigator that Lyons had given the car to her and she had the keys to it. Although she initially said she could not give consent to take the car, she eventually did so after the investigator explained that he would just get a search warrant to obtain the car. Once the car was towed to a secure garage, it was searched and processed. Men's clothing and a paystub belonging to Lyons were found in the car's trunk, as were two white towels that appeared to have blood on them. Marlboro cigarette butts were found in the car's ashtray and spots of blood were found inside the rear passenger side of the car. A photo of Lyons flashing gang signs was also found inside the car. A high velocity spray/mist that tested presumptively for blood covered the top of the car. Although DNA testing of the blood stains found on the outside of the car were inconclusive, samples from inside the car matched that of Olmos and the blood on the towels in the trunk matched Lyons.

When Reynolds was contacted by telephone on August 19, 2004, he told Riverside County Sheriff's Department Homicide Investigator Bruce Moore that he had spent the day of August 4, 2004, with his friend Gordin, first at a barbecue and then running errands with Gordin and another young woman to obtain lottery tickets at a gas station for himself and a friend named Mike Evans before driving over to Evans's apartment to

deliver the lottery tickets. When Reynolds was interviewed in person by Moore on August 25, 2004, "he was much more forthcoming in telling [Moore] information." At that time, Reynolds told Moore he was affiliated with the Hillside Mafia gang in Banning and that on August 4, 2004 he had seen Lyons twice. "Once when he was walking over to . . . Gordin's residence [at about 5:00 p.m.], Mr. Lyons contacted him and asked him to provide an alibi for him [for something that was going to happen that night]." Reynolds then encountered Lyons again at Lyons's apartment somewhere between 10:30 and 11:00 p.m. Reynolds indicated to Moore that during the first encounter Lyons said "he was going to take care of business" and that he understood that to mean that Lyons was "going to kill a girl that night." The alibi Lyons wanted Reynolds to go along with was supposed to involve spending the night at Lyons's aunt's house in Fontana.

Reynolds then reiterated he had spent time with Gordin that evening, going out to buy lottery tickets, purchase gas, then obtaining more lottery tickets and finally going over to Evans's residence. When Reynolds saw Lyons again later that night at his residence, which was in the same building as Evans's apartment, Lyons told Reynolds he had taken "care of that bitch" and that he had "killed her." Lyons again asked Reynolds to help him with his alibi, suggesting they go to his aunt's house to work on it.

During the subsequent investigation, Moore interviewed both Gordin and Evans, as well as a woman living with Evans named Justine Velez, who was later identified as Lyons's sister. Riverside County Sheriff's Department Senior Homicide Investigator Jeff Buompensiero, who was the primary investigator on the case, reviewed Moore's various reports of his interviews, as well as reports regarding the crime scene and the physical

evidence collected. In addition to the above processing of Lyons's car, Buompensiero, ordered various forensic and DNA testing of material found on the victim Olmos, including a rape kit examination. The DNA profile of the sperm found in Olmos's vagina and rectum matched Lyons's DNA profile. Fingernail scrapings from Olmos's right hand also matched Lyons's DNA. Scrapings from her left hand appeared to be a mixture of several people, but Lyons's DNA was not part of that mixture.

Based on information provided to Buompensiero by a confidential informant about telephone calls from the jail revealing that Lyons was involved in Olmos's murder, he and other investigators additionally listened to numerous recorded jail calls made by Lyons and other inmates from the Riverside County Sheriff's Department jail facilities. After reviewing the calls by Lyons, in particular one to White Girl on August 19, 2004 and another to his father on August 30, 2004, and after checking out Reynolds story, Lyons was charged in this case with Olmos's murder.

At trial, the above evidence was presented in the prosecution case. In addition, Reynolds testified both in the prosecution and defense cases. As a prosecution witness, Reynolds admitted he had had previous trouble with the law, including weapons charges, possession of drugs and "DUI's." Reynolds initially could not remember making most of the above statements to the police or seeing Lyons on the evening of Olmos's murder. After further questioning and changing his answers several times, Reynolds finally admitted that he had seen Lyons several times on August 4, 2004, and that the second time, which was about 10:45 p.m., Lyons had told him that he had killed Olmos and again had asked him to be his alibi. Reynolds explained that although he refused Lyons's

alibi request, he thought he was just joking about killing Olmos. Reynolds conceded that two nights before testifying at trial that his car had been shot, but he did not know who had done it.

Gordin testified consistently with what she had told investigators before trial as to spending time with Reynolds on August 4, 2004, and about Reynolds and her going with another woman to purchase and drop off lottery tickets to Evans and Velez. Gordin said that only Reynolds got out of the car at Evans's apartment to drop off the tickets and that she did not see Lyons at that time.

During Investigator Moore's cross-examination, he explained that he had originally considered Reynolds a suspect in Olmos's murder and had confronted him during pretrial interviews because he had a motive to kill her as Olmos was suppose to testify in his "best friend" Gordin's brother's case of attempted murder. Gordin's brother was charged in that other case along with Nelson, Olmos's boyfriend. When confronted with such motive, Reynolds denied it, telling Moore that he had heard "there was a $50,000 bounty on . . . Olmos's head [and that] Lyons would kill her for the money."

Investigator Buompensiero was called several times in the prosecution case regarding the investigation and also for laying the foundation for playing portions of several jail telephone calls made by Lyons to people outside the jail. The three-way call made by Lyons on August 19, 2004, which was played for the jury, included a conversation with White Girl. In that call, when Lyons asked her if she still had the keys to his car, she told him the sheriff's department had just taken his car. When he then asked White Girl whether she had disinfected the car as he had asked her to do, she told

him that she had sprayed the car with some type of enzyme, but then admitted she had not washed or sprayed the car windows. Upon hearing this, Lyons lost his temper, saying, "Fuck it I am gone." "I'm not yelling at you, I am saying I am gone. Fuck man. You didn't even spray." Lyons continued to berate White Girl for letting the sheriff's deputies take the car, saying, "Everything would have been dismissed if you didn't clean the fucking car out. Fucking now I'm fucked."

In the second three-way call played for the jury, which was made on August 30, 2004, Lyons told his father that if he were able to make bail, he was "going to run." In a call made on September 1, 2004, by Lyons to Evans, Lyons told him that a defense investigator would be stopping by to speak to him and Velez and that Velez should tell the investigator "about her seeing that one girl, or whatever her name was, leaving," and that she should say that she saw the girl leave and that Lyons then left around 9:00 p.m.

Buompensiero testified that in all the numerous phone calls made by Lyons from the jail, there was nothing to indicate in his various conversations that Reynolds did the shooting of Olmos.

The Defense Case

Buompensiero was called as a defense witness to lay the foundation to play a three-way telephone call made August 4, 2004, by Delbert Sanchez, an Eastlake Banning Sapos gang member who was in prison for a gang murder, to his cousin Reynolds via Sanchez's mother. In the call, after Sanchez, Reynolds and Sanchez's mother joked about Lyons messing up, Reynolds asked Sanchez, "Is [Lyons] gonna take care of that business,

or do I got to do it?" When Sanchez asked, "Which one?" Reynolds responded, "The one you talked to us about."

When Reynolds was called as a defense witness, he testified he had not known that Olmos was going to be killed before the shooting took place, that Sanchez never talked to him about having her killed and that he had not talked with Sanchez since August 4, 2004. Questioned about what was meant by the phrase "taking care of business," Reynolds explained that it referred to personal, family business and about taking care of Sanchez's daughters. Reynolds also denied Sanchez had mentioned that he wanted Lyons to kill Olmos, that Lyons had refused the request or that Lyons had said anything about "taking care of a girl."

In response to a series of questions, Reynolds denied he told his girlfriend in a telephone call that on the evening of the murder he had been at Lyons's apartment with Lyons and Olmos and that they had consensual sexual intercourse at that time; that the three had gone together to the Morongo Indian reservation that night; and that a few days after the murder, Lyons had told him that he had shot Olmos in the head. Reynolds also denied telling the authorities that when he saw Lyons at around 11:00 p.m. on August 4, 2004, that Lyons said he had killed Olmos and that Lyons had asked Reynolds to help him create an alibi. Reynolds conceded he had talked to Lyons that night about going to his aunt's house, but claimed it was to give her money and not for an alibi.

Reynolds further denied he had borrowed Lyons's Galant on the evening of the murder and had taken Olmos out to the reservation to shoot her. He also denied he ever

told Lyons that he had killed Olmos or suggested to him that his aunt would be willing to provide alibis for both of them.

On cross-examination, Reynolds admitted that his testimony for the defense was different from his testimony as a prosecution witness. He did not want to testify against Lyons. Reynolds knew that bad things happened to someone who testifies against another person and is labeled a "snitch." He also knew that both Sanchez and Lyons were members of the Eastside Banning Sapos gang and that Lyons had owed Sanchez a favor because he had snitched on Sanchez regarding his murder case.

Lyons's cousin, who had a sexual relationship with Reynolds in 2004, testified in the defense case that Reynolds smoked Marlboro Light 100s or Reds, that Gordin smoked Marlboro Reds, and that Lyons did not smoke cigarettes. In response to questions, Lyons's cousin explained that she is not surprised that Lyons lives in a rundown apartment even though he is an Indian and gets "per cap money," because "all Indians [on the Morongo Reservation] live like that."

Evans also testified in the defense case that around 5:00 or 6:00 p.m. on August 4, 2004, he saw Reynolds and arranged for Reynolds to pick up some lottery tickets for him. Later that night, at around 9:30 or 10:00 p.m., Reynolds stopped by Evans's apartment with Gordin, knocked, but when Evans ignored them and refused to answer the door because his girlfriend Velez did not get along with Gordin, Evans saw Reynolds and Gordin go upstairs toward Lyons's apartment. Evans then heard someone talking upstairs and thought he heard Reynolds say that "nothing happened in the car." Evans saw Reynolds and Gordin come back down the stairs no later than 10:30 p.m. On cross-

examination, Evans conceded this was the first time he had given this version of what happened on the evening of August 4, 2004. He also admitted that Lyons was paying for his and Velez's rent.

Finally, in the defense case it was stipulated that during a pretrial interview, when an investigator suggested to Reynolds that a witness had said he and Gordin had picked up Olmos before she died, Reynolds responded, "I don't see how that is possible because my parents took away my truck."

Rebuttal

In rebuttal, Olmos's sister testified that Olmos smoked Marlboro Reds. Buompensiero was also recalled to talk about additional recorded jailhouse and prison telephone calls involving Lyons and/or Sanchez. Buompensiero had listened to several conversations between Sanchez and Lyons before August 4, 2004, to hundreds of calls from Sanchez to other people, and to "a couple hundred" calls after August 18, 2004 by Lyons to other people. In none of the recordings had Buompensiero heard Lyons say that Reynolds had taken his car on the night of August 4, 2004, or that he had brought it back dirty that night, or that it was Reynolds who had shot and killed Olmos.

The tape of a call from Sanchez to his wife on August 6, 2004, the foundation of which was stipulated, was then played for the jury. In that conversation, Sanchez's wife referred to Olmos's murder as "[t]he one Gary [Lyons] took care of." Later in the same conversation, Sanchez said, "And you know what the sad part is, I told him to do it." On cross-examination, Buompensiero agreed that because the information was not yet in the public light, Sanchez's wife must have gotten the information in the phone call to

Sanchez someplace other than the newspaper and that Reynolds as well as Lyons could have told her the information. Buompensiero believed that Sanchez had directed Olmos to be killed and that Lyons was Sanchez's protégé in the Banning Sapos gang.

In closing argument, Lyons's counsel characterized this crime as "an execution, pure and simple," explaining that it "was something that somebody intended to do, planned to do, and carried out. There's really no other way to explain it. It's a cold-blooded murder. And I don't think either side can bring up a point that there shouldn't be great sympathy, that this isn't a great tragedy, that this is an undeserved taking of a life, any human life." Counsel stressed that what was in dispute and was the entire dispute in this case was the "idea of third-party culpability." Essentially, counsel argued that the jury would only have to decide who was the person who committed the crime as charged in count 1, i.e., the premeditated, lying-in-wait murder with a firearm, that there was no lesser crime, that it was really Lyons versus Reynolds, that there was sufficient circumstantial evidence to point to either one, and that only if the jury could decide the evidence proved beyond a reasonable doubt that Lyons and nobody else, like Reynolds, did this murder, could they convict Lyons of the count 1 charge. In this regard, defense counsel asked the jury to consider whether there was any evidence that Reynolds rather than Lyons committed this crime, i.e., by considering who had the motive or better reason to do it and the opportunity to follow through on Sanchez's order as the trigger man, and if so, there would be a reasonable doubt and they could not convict Lyons as charged in this case.

The jury determined Lyons was guilty as charged.

DISCUSSION

Lyons does not challenge the sufficiency of the evidence to support his first degree murder conviction or the true findings of lying in wait and intentional firearm use. Nor does he challenge the sentence imposed. Rather he raises numerous trial errors, which he claims affected the fairness of his trial. We review his claims below and conclude he has shown no miscarriage of justice that would require a new trial.

I

ADMISSION OF TAPED JAIL PHONE CONVERSATION

Lyons contends the trial court committed prejudicial error by admitting the August 6, 2004 audiotape of a jail phone call between Sanchez and his wife under Evidence Code section 1230, the declaration against penal interest exception to the hearsay rule. Lyons argues the court improperly found Sanchez's statements in that call qualified for the against penal interest exception because the statements were not "distinctly" against Sanchez's penal interest or trustworthy, and Sanchez's unavailability as a witness was not shown. On this record, we conclude that Lyons has forfeited any claim based on Sanchez's unavailability as a witness because he did not object on such ground below and that the trial court did not prejudicially abuse its discretion in admitting the August 6, 2004 audiotape between Sanchez and his wife.

At the conclusion of the defense case, outside the presence of the jury, the prosecutor advised the court that in rebuttal he planned to recall Buompensiero to set the foundation for playing three phone calls from Sanchez to his wife and his mother on August 5 and 6, 2004, in response to the third party culpability theory presented by the

defense, which indicated that Sanchez and his wife "knew who did the killing." The prosecutor explained he would play "three short snippets in which they talk about things that only the killer would know, because none of that information was released to the public at all at the time these phone calls were made."

Lyons's counsel objected that the recordings were "pure hearsay" and violated Lyons's right to cross-examine Sanchez's mother and wife on where they got their information that they were passing on to Sanchez about the murder.

The court agreed with the prosecutor that the statements were nontestimonial, but questioned their reliability, asking the prosecutor how he knew that Lyons made these statements to Sanchez's mother and wife about how the murder was committed that are being conveyed to Sanchez. The prosecutor explained that the information discussed was such that only the killer would know and that such provides a "layer of trustworthiness." In addition, the prosecutor posited that the statements were being used for the nonhearsay purpose of rehabilitating Reynolds "by the fact that other people, as well, knew that it was . . . Lyons [who had killed Olmos], because it probably came from his mouth, because they would only have that information from his mouth."

When the court then asked the prosecutor to explain why the statements would be a declaration against penal interests for Sanchez and his mother, the prosecutor stated the statements were against Sanchez's interest because he knew about the crime and had also told Lyons to do it and were against his mother's interest because "she was going to participate in an alibi or something to that effect." At that point, the court noted it was

not inclined to let the tapes in, but would give the prosecutor until the next day to bring in some authority and further argue for the admission of such evidence.

The next day, after the court had read a motion by the prosecutor to admit the statements by Sanchez, his mother and his wife made in two phone calls, one on August 5, 2004 and the other on August 6, 2004, the court tentatively ruled it would permit Sanchez's statement that "he told him to do it" as a declaration against interest, but was not inclined to let in the rest as most of the conversations were "gossip" from Sanchez's mother and wife. When the prosecutor protested that the other statements were necessary to provide background information for what Sanchez was saying, the court noted it did not want to admit those statements because they were "very inflammatory." Nonetheless, the prosecutor continued to argue that all statements should come in because when they were placed in context they indicated "a level of trustworthiness" sufficient for admission; i.e., the statements showed that at the time Sanchez made his declarations implicating himself, he knew about the crime and about other information that not even the police knew or had released, and Sanchez and the others talked about "DNA coming back to . . . Lyons."

The court thereafter reiterated its tentative, saying the conversation on August 6 would be admitted but not the one on August 5 and asked defense counsel to comment. Counsel basically complained that letting in any of the statements would be a violation of Lyons's Sixth Amendment right to cross-examine and confront the declarants on their statements. The court disagreed but noted it was a "big issue on appeal," which could cause a reversal if the prosecutor still wanted to go forward to admit the statements.

When the prosecutor stated he wanted to proceed with the admission of Sanchez's statements as declarations against his penal interest, the trial judge clarified "the ruling is that the conversation of August 6th, 2004, you can play the tape. You can have the detective talk about it. But the conversation of August 5th, 2004, I'm keeping out. And the reason I'm doing it for is everything we said, plus the [Evidence Code section] 352 balancing act." The court further clarified that the prosecutor would only be permitted to play the half page of conversation that had been in his points and authorities. That portion, which was subsequently played for the jury, provided:

> "[Sanchez]: Hey, did you--did you--I'm going to tell mom to mail me that newspaper article. [¶] [Wife]: What newspaper article? [¶] [Sanchez]: Of-- [¶] [Wife]: Oh, didn't know that that---that girl was the one who snitched off [Nelson]. [¶] [Sanchez]: What girl? [¶] [Wife]: The one Gary [Lyons] took care of. [¶] [Sanchez]: Yeah. Yeah. Yeah. Yeah. Did you hear what happened? Did you get the details? [¶] [Wife]: What? How--how she gave him head and then that's it? [¶] [Sanchez]: No. Six shots in the head. [¶] [Wife]: Oh, are you serious? [¶] [Sanchez]: Two in the back of the head and then turned around and four in the face. [¶] [Wife] How the fuck did--how do they even know it's her? [¶] [Sanchez]: They didn't. They couldn't identify her. In the newspaper they can't be--she can't be identified. The only way is because the way-- [¶] [Wife]: They're fucking sick. I can't imagine her face. [¶] [Sanchez]: What she was wearing and she had a thing that had her name in it, but they couldn't match it in the paper. [¶] [Wife]: It was--it was up--up close and personal? [¶] [Sanchez]: Yeah. Yeah. [¶] [Wife]: (Inaudible) Sick bastard. [¶] [Sanchez]: And you know what the sad part is? I told him to do it! [¶] [Wife]: I don't think you should be saying that. Hold on. Okay."

Evidence Code section 1230 provides in pertinent part that "[e]vidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the

statement, when made, . . . so far subjected him to the risk of . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." Under this hearsay exception, "[t]he proponent of such evidence must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character. [Citation.]" (*People v. Duarte* (2000) 24 Cal.4th 603, 610-611 (*Duarte*).)

Whether a statement falls under the declaration against penal interest exception is determined by viewing the statement in the context in which it was made. (*People v. Lawley* (2002) 27 Cal.4th 102, 153 (*Lawley*).) In doing so, the trial court may take into consideration the words themselves, the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant in determining whether a particular declaration against penal interest is sufficiently trustworthy for purposes of the exception under Evidence Code section 1230. (*People v. Cudjo* (1993) 6 Cal.4th 585, 607.) The exception generally does not apply to " 'any statement or portion of a statement not itself specifically disserving to the interests of the declarant.' " (*Duarte, supra,* 24 Cal.4th at p. 612.)

We review the trial court's decision as to whether a statement is admissible as a declaration against penal interest for abuse of discretion. (*Lawley, supra*, 27 Cal.4th at pp. 153-154.) Applying such standards in this case, we conclude the trial court did not abuse its discretion in ruling that Sanchez's statement, "And you know what the sad part is? I told him to do it" was admissible as a declaration against Sanchez's penal interest.

Such statement could subject Sanchez to criminal liability and a reasonable person in his position would not have made the statement unless he believed it to be true. (See *People v. Jackson* (1991) 235 Cal.App.3d 1670, 1678.) The circumstances surrounding the making of the statement, i.e., he made the statement to his wife who was discussing the circumstances of the murder with him shortly after the killing, were such that the trial court could find them sufficiently reliable. (See *People v. Greenberger* (1997) 58 Cal.App.4th 298, 335 [that conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosures is a most reliable circumstance].)

As noted above, because Lyons did not contest the prosecutor's assertion that Sanchez was unavailable as a witness below, he may not do so now. (Evid. Code, § 353; *People v. Smith* (2007) 40 Cal.4th 483, 517.) Likewise, his failure to raise any issue regarding a confidential marital communication also waives any appellate claim that the entire conversation was privileged and could not be admitted.

Regarding the other statements by Sanchez and his wife on the admitted audiotape, they appear to have been permitted merely to give context to Sanchez's statement made against his penal interest and not for their truth. Although defense counsel had initially complained about the admission of other statements by Sanchez and that he could not confront Sanchez's wife about the source of her information, counsel did not press the court to rule separately on the admission of those other statements or ask that the audiotape be further redacted after the court decided only a small portion of the taped statements could be used by the prosecutor in rebuttal to rehabilitate Reynolds. Had counsel done so, we are confident that the trial judge, who was clearly aware of the

possible prejudice in the admission of the entirety of the audiotapes, may have ordered further redaction of the short portion actually played for the jury.

Nonetheless, even assuming the trial court erred in admitting those other portions of the August 6, 2004 audiotape, any error was harmless beyond a reasonable doubt because the evidence of Lyons's guilt was overwhelming. (See *People v. Brown* (2003) 31 Cal.4th 518, 538-539.) The evidence showed that on the day of the murder Lyons had told Reynolds that he was going to kill Olmos and had asked him to be his alibi. Olmos's good friend Davila later that day saw Olmos get into Lyons's car and also talked to both her and Lyons shortly before Olmos was killed. After the murder, Lyons told Reynolds he had killed Olmos and again asked him to help him with an alibi. Evidence found on Olmos's body and in Lyons's car tied him to the murder. His DNA was found in her vagina, rectum, and under the fingernails of her right hand, her blood was found inside his car, and blood spatter was found on the outside of his car. When Lyons was interviewed after being arrested on other charges, he confirmed he had been with Olmos on August 4, 2004, and he subsequently telephoned family and friends from the jail making incriminating statements concerning the crime. Under the totality of the circumstances, even assuming error, it was harmless beyond a reasonable doubt.

II

JURY INSTRUCTION ISSUES

The general rule in a criminal case is that the trial court must instruct on the "principles of law relevant to the issues raised by the evidence [citations] and has the correlative duty 'to refrain from instructing on principles of law which not only are

irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues.' [Citation.]" (*People* v. *Saddler* (1979) 24 Cal.3d 671, 681.) Thus, when a defendant raises claims of instructional error, " 'we must first ascertain what the relevant law provides, and then determine what meaning the instruction given conveys. The test is whether there is a reasonable likelihood that the jury understood the instructions in a manner that violated the defendant's rights.' [Citation.] We determine the correctness of the jury instructions from the entire charge of the court, not from considering only parts of an instruction or one particular instruction. [Citation.] The absence of an essential element from one instruction may be cured by another instruction or the instructions taken as a whole. [Citation.] Further, in examining the entire charge we assume that jurors are ' " 'intelligent persons and capable of understanding and correlating all jury instructions which are given.' " ' " (*People v. Smith* (2008) 168 Cal.App.4th 7, 13 (*Smith*).) The United States Supreme Court applies these same standards in reviewing claims that an instruction has violated a defendant's due process. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72; *Smith*, *supra*, at pp. 13-14.)

With these preliminary rules in mind, we address Lyons's various contentions of instructional error.

A. Instructions Given

Lyons contends the trial court prejudicially erred in instructing the jury with CALCRIM Nos. 200, 220, 370, 521 and 728, claiming that each in some way is an incorrect or misleading statement of law. Lyons, however, did not object at trial that any

of these instructions were incorrect statements of law or misleading or request that any of them should be modified or limited with regard to the parsed language of each to which he now complains. In fact, Lyons specifically requested each of the now complained of instructions.

Generally, a failure to object to instructional error forfeits the issue on appeal if the instruction is correct in law and the defendant has failed to request clarification. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1138; *People v. Campos* (2007) 156 Cal.App.4th 1228, 1236 (*Campos*).) Three of the challenged instructions, which are generally used in the guilt phase of all criminal trials to explain the duties of the judge and jury (CALCRIM No. 200), to explain reasonable doubt (CALCRIM No. 220), and to explain how to evaluate a defendant's motive or lack of motive to commit a crime (CALCRIM No. 370), have all been upheld as correct statements of the law. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 504 (*Hillhouse*) [discussing motive]; *People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088-1089 [discussing CALCRIM No. 220]; *Campos, supra,* 156 Cal.App.4th at pp. 1238-1239 [discussing CALCRIM No. 220]; *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1185-1186, 1192-1193 (*Ibarra*) [discussing CALCRIM Nos. 200, 220, 370]; *People v. Anderson* (2007) 152 Cal.App.4th 919, 927-929 (*Anderson*) [discussing CALCRIM No. 200].)

In addition, both CALCRIM Nos. 521 (Murder: Degrees) and 728 (Special Circumstances: Lying in Wait) have been upheld as properly defining respectively, the elements of lying-in-wait first degree murder and the elements for the lying-in-wait special circumstance. (See *People v. Jurado* (2006) 38 Cal.4th 72, 127 (*Jurado*)

[discussing constitutionality of lying-in-wait circumstance]; *People v. Poindexter* (2006) 144 Cal.App.4th 572, 582-585 (*Poindexter*) [discussing CALCRIM No. 521's lying-in-wait requirements].) Although we believe Lyons has technically forfeited these instructional claims by failing to object to the particular language of each properly given instruction he now challenges, we briefly address and reject his arguments that the giving of the instructions affected his substantial rights.

As already noted, we are guided in our review by the general principle that unless Lyons has demonstrated there is a reasonable likelihood that the jury understood the challenged instruction in a manner that violated his rights after a consideration of the instructions as a whole, we will find no instructional error. (See *Smith, supra,* 168 Cal.App.4th at p. 13.)

1. CALCRIM No. 200

Lyons contends the giving of CALCRIM No. 200 defining the duties of judge and jury was improperly coercive and wrongly implied that the reasonable doubt instruction may not apply. He argues the language of the instruction that tells the jurors that they are to "decide what happened" and that they "must reach [their] verdict without any consideration of punishment" is impermissibly coercive in that it suggests the jury must reach a decision. He also argues the portion of the instruction that tells the jurors that not all instructions may apply deprives the jurors of necessary guidance and allows them to ignore the reasonable doubt instruction. Lyons's claims have been rejected in both *Anderson, supra,* 152 Cal.App.4th at pages 928 to 929, and *Ibarra, supra,* 156 Cal.App.4th at page 1185. We agree with the reasoning in those cases. Lyons simply has

not shown that there is any reasonable likelihood that the jury in this case understood the language of CALCRIM No. 200 as requiring it to reach a decision and ignore the reasonable doubt instruction.

2. CALCRIM No. 220

Lyons contends the court erred in instructing the jury on reasonable doubt under CALCRIM No. 220, arguing it erroneously implies bias may be permissible for reasons other than that a defendant has been arrested, charged and brought to trial, it fails to inform the jury it must find the existence of every element and every essential fact beyond a reasonable doubt, it does not clearly explain the concept of "abiding conviction," and it lowers the prosecutor's burden of proof by precluding the jury from considering reasonable doubt arising from the lack of evidence. Each of Lyons's arguments have squarely been rejected. (See *People v. Zepeda* (2008) 167 Cal.App.4th 25, 31; *Campos, supra*, 156 Cal.App.4th at pp. 1237-1239; *Ibarra, supra*, 156 Cal.App.4th at pp. 1185-1186; *People v. Guerrero* (2007) 155 Cal.App.4th 1264, 1268.) Quite simply, CALCRIM No. 220 neither suggests an impermissible definition of reasonable doubt to the jury as Lyons posits, nor does it prohibit the jury from following the constitutionally required standard of proof beyond a reasonable doubt. No instructional error is shown.

3. CALCRIM No. 370

Lyons contends CALCRIM No. 370 regarding motive was misleading in this case because it directed the jury only to consider his motive (as the defendant) for committing the crime charged but did not tell the jury it could consider the motive of third parties

when there was evidence of third party culpability. Lyons has provided no reasoned argument or authority for his claim that the instruction should have been modified sua sponte to include the motive of third persons. As noted above, CALCRIM No. 370 correctly states the law and allows the jury to consider the presence or absence of a motive of the person committing a crime and to give whatever weight it deems appropriate to either situation. (*Hillhouse, supra*, 27 Cal.4th at p. 504.) Nothing in the instruction tells the jury it may not consider evidence of a third party's motive to commit the charged crime as Lyons suggests. Because Lyons failed to request a modification of CALCRIM No. 370 to include a reference to third party motive, he has forfeited this claim on appeal. (*Campos, supra*, 156 Cal.App.4th at p. 1236.)

4. CALCRIM No. 521

Without argument or authority, Lyons further complains that CALCRIM No. 521 "wrongly implies that the period of watching and waiting for murder by means of lying in wait need not be substantial" because it does not include the language that such period must be "substantial." In *People v. Ceja* (1993) 4 Cal.4th 1134, our Supreme Court held that "jury instructions defining the required period of lying in wait, which indicate that it need not be for any particular length of time (so long as it is sufficient to demonstrate that defendant had a state of mind equivalent to premeditation or deliberation), sufficiently reflect the . . . requirement that the period of watching and waiting be for a 'substantial period.' [Citations.]" (*Poindexter, supra*, 144 Cal.App.4th at p. 585.) Because CALCRIM No. 521 defines the waiting period in such terms, it is proper (see *Poindexter, supra*, at pp. 582-585) and Lyons's assertion otherwise is rejected.

5. CALCRIM No. 728

Lyons additionally claims that the special circumstance lying-in-wait instruction in CALCRIM No. 728 should not have been given in his case because it does not provide any meaningful distinction between premeditated and deliberate murder and murder committed by lying in wait and therefore is unconstitutional under federal law. As Lyons recognizes, our Supreme Court rejected a similar assertion in *People v. Morales* (1989) 48 Cal.3d 527, 557.) More recently, our high court has upheld the constitutionality of the lying-in-wait special circumstance in *Jurado, supra*, 38 Cal.4th at page 127, and this court has determined the passage of Proposition 18 does not alter these determinations. (See *People v. Superior Court* (*Bradway*) (2003) 105 Cal.App.4th 297, 306-309.) Lyons has failed to show any reason to deviate from these decisions in this case.

B. Instructions Not Given

Lyons next complains the trial court prejudicially erred in failing to give sua sponte CALCRIM Nos. 316, 416, 418, and 640 or 641. No prejudicial error is shown.

1. CALCRIM Nos. 640/641

Although the People concede the trial court erred in failing to instruct the jury with CALCRIM No. 641 (Deliberations and Completion of Verdict Forms: For Use When Defendant is Charged with First Degree Murder and Jury Is Given Only One Not Guilty Verdict Form for Each Count) because the jury in this case was given only one not guilty verdict form for the count 1 murder charge in which it could have determined that Lyons was guilty of second degree rather than first degree murder (see Judicial Council of Cal.

Crim. Jury Instns. (Fall 2008) Bench Notes to CALCRIM Nos. 640, 641), the error in failing to do so in this case is clearly harmless.

In general, in all homicide cases where one or more lesser offense is submitted to the jury, the court has a sua sponte duty to give CALCRIM No. 640 (Deliberations and Completion of Verdict Forms: For Use When Jury is Given Not Guilty Forms for Each Level of Homicide) or CALCRIM No. 641. (See *People v. Avalos* (1984) 37 Cal.3d 216, 228 [must instruct jury that it must be unanimous as to degree of murder] and *People v. Fields* (1996) 13 Cal.4th 289, 309-310 [duty to instruct that jury cannot convict of a lesser offense unless it has concluded that defendant is not guilty of the greater offense].) Even though Lyons's defense counsel did not want any lesser offense instructions given, he acquiesced in the given instructions that told the jurors they must decide whether the murder was first or second degree, which is a lesser offense of murder. (CALCRIM No. 521.) Thus technically, the court was required to give CALCRIM No. 640 or No. 641, with CALCRIM No. 641 being applicable here because there was only one not guilty verdict form for the count 1 murder. Such instruction would have conveyed to the jury that it could not decide Lyons was guilty of second degree murder without first unanimously agreeing that he was not guilty of first degree murder. In other words, CALCRIM No. 641 would have explained to the jury the mandate that if there was a reasonable doubt in which of the two degrees of murder for which Lyons was guilty, he could only be convicted of the lowest of such degrees.

However, the failure to give such instruction cannot possibly be prejudicial in this case. The given instructions told the jurors they must determine whether the murder was

first or second degree, explained the elements of both deliberate, premeditated first degree murder and first degree murder while lying in wait told them that the People must prove beyond a reasonable doubt that the killing was first degree rather than a lesser crime, which in this case would be second degree murder, and that if the People had not done so, the jurors must find Lyons not guilty of first degree murder (CALCRIM No. 521). In addition, Lyons's defense counsel conceded during closing arguments that the murder was of the first degree by premeditation as well as by lying in wait. In light of the instructions given, Lyons's concession, and the fact the jury specifically found Lyons guilty of first degree murder and found true the special circumstance allegation of lying in wait, it is not reasonably probable that a different outcome would have been achieved had CALCRIM No. 641 been given. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

2. CALCRIM Nos. 416 and 418

Lyons also contends the trial court had a sua sponte duty to instruct the jury with CALCRIM Nos. 416 (Evidence of Uncharged Conspiracy) and 418 (Coconspirator's Statements). However, because the prosecution did not rely on or present evidence of an uncharged conspiracy as a theory to convict Lyons, and Sanchez's statement in the telephone call was admitted as one made against penal interest and not as a coconspirator's statement, the court was not required to give either instruction.

3. CALCRIM No. 316

Finally, Lyons contends the trial court erred by not instructing the jury with CALCRIM No. 316 (Additional Instructions on Witness Credibility-Other Conduct),

which tells the jury how to evaluate the credibility of a witness who has been convicted of a felony or has committed a crime or other misconduct without a conviction. He argues the instruction was necessary for the jury to fully and fairly evaluate Reynolds's credibility as Reynolds had suffered prior convictions and had committed misconduct involving moral turpitude. We find no prejudicial instructional error on this record.

During initial jury instruction discussions, when Lyons's counsel brought up the fact that CALCRIM No. 316 should be given because Reynolds had prior felony convictions, the prosecutor commented that he had not asked Reynolds if he had any felony convictions, only about engaging in bad conduct. After the court noted there were other instructions covering bad conduct because there was no proof Reynolds had a prior conviction in evidence, defense counsel commented he might ask Reynolds about his prior felony convictions for possession of a firearm in a vehicle and drug transporting when he was called as a defense witness. Over the prosecutor's objection that the possession of a firearm conviction was not a crime of moral turpitude, the court ruled, with defense counsel's agreement, that Reynolds could be impeached with his prior drug conviction, but not the firearm prior, and that it would give CALCRIM No. 316 "assuming that actually happens."

At the end of trial, when the court returned to the issue of jury instructions, it noted it had put a question mark next to CALCRIM No. 316 regarding felony convictions and that Reynolds had not been asked whether he had any. Defense counsel explained that he had seen no reason to ask Reynolds about them and he did not know if CALCRIM No. 316 were applicable now. When the prosecutor objected that the instruction was not

warranted because the firearm offense did not involve moral turpitude and Reynolds was not asked about the fact that he sold drugs, defense counsel said, "I really don't care. I think it's pretty clear the caliber of these witnesses."

In then ruling that CALCRIM No. 316 would not be given, the trial judge stated, "I just like to point out in [CALCRIM No.] 226, which is the instruction about how you evaluate witnesses, it says, 'Has the witness engaged in conduct that reflects on his or her believability,' which covers a whole range of things, so I won't give [CALCRIM No.] 316 based on what the two of you said. And we will still give what's in [CALCRIM No.] 226."

Based on this record, we can glean no error in the trial court not giving CALCRIM No. 316. As the court noted in declining to give the instruction, how to evaluate the accuracy and credibility of the testimony by Reynolds or other witnesses based on any misconduct was covered already in CALCRIM No. 226, no actual evidence that Reynolds had suffered a prior conviction had been presented, and the defense essentially conceded the instruction was not necessary. No prejudicial error is shown.

III

CLAIMED PREJUDICIAL PROSECUTORIAL MISCONDUCT

Lyons next contends the prosecutor committed 22 acts of misconduct, which cumulatively denied him due process and a fair trial. Lyons specifically claims that during trial the prosecutor wrongly exploited his failure to incriminate himself as an accessory after the fact, created false inferences, introduced prejudicial character evidence of his drug use, wrongly insinuated he was involved in witness intimidation,

wrongly insisted that defense witnesses had a duty to provide information to the prosecution, wrongly disparaged defense witnesses by expressing a personal belief in their veracity, and improperly bolstered the facts in this gang motivated murder by reference to Sanchez's gang murder case. Lyons claims the prosecutor committed additional misconduct during closing argument by stating facts not in evidence, by making emotional appeals to the jury about Olmos and her mother, by misstating the law of discovery, the law of murder and the law of lying in wait, by making improper references to an investigator's nickname, by improperly referencing his nonstatements in his jail telephone calls, by improperly referring to an investigator's reputation, by misstating the DNA evidence, by referring to evidence that Reynolds did not provide, by stating his personal belief as to the trajectory of the bullet, by disparaging the defense, by improperly using indecent and inflammatory language, and by improperly referring to his ethnic background.

The People counter that the claims of prosecutorial misconduct, also referred to as "prosecutorial error" (*People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 (*Hill*)), have been forfeited by Lyons's failure to object to any of the alleged acts of misconduct or to request that the jury be admonished to disregard the alleged respective impropriety.

We set out the pertinent law concerning prosecutorial misconduct before briefly addressing Lyons's assertions of such error.

A. Applicable Legal Principles

"The standards under which we evaluate prosecutorial misconduct may be summarized as follows. A prosecutor's conduct violates the Fourteenth Amendment to

the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. Furthermore, . . . when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Morales* (2001) 25 Cal.4th 34, 44 (*Morales*).)

In general, a prosecutor commits misconduct when he or she intentionally elicits inadmissible evidence or testimony. (*People v. Chatman* (2006) 38 Cal.4th 344, 379-380 (*Chatman*).) Nevertheless, evidence of drug use may be admissible if relevant to show motive (*ibid*.), and evidence presented that a witness is afraid to testify or is fearful of retaliation for testifying, including that of the witness's demeanor, is relevant and admissible to the credibility of the witness and does not constitute misconduct even if intentionally elicited. (Evid. Code, §§ 210, 351, 780, subd. (a); *People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449-1450 (*Sanchez*).)

In addition, although a prosecutor may not give a personal opinion or belief as to a witness's credibility or the defendant's guilt if it will suggest to the jury that the prosecutor has information bearing on such credibility or guilt that was not disclosed at trial, the prosecutor may offer an opinion on the state of the evidence as long as it amounts to fair comment, which includes reasonable inferences and deductions drawn from the evidence. (*People v. Frye* (1998) 18 Cal.4th 894, 971, 975-976 (*Frye*),

disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *Hill, supra,* 17 Cal.4th at p. 819.) In such situations, the prosecutor's statements must be viewed in the context of the arguments as a whole and the defendant, to prevail on a claim of misconduct based on those statements, must show a reasonable likelihood that the jury understood or applied them in an improper or erroneous manner. (*Frye, supra,* at p. 970.) Moreover, " '[i]t is improper for the prosecutor to misstate the law generally . . . and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. [Citation.]' [Citation.]" (*Hill, supra,* at pp. 829-830.)

However, "[t]o preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct. [Citation.]" (*People v. Price* (1991) 1 Cal.4th 324, 447.) Therefore, to avoid forfeiture or waiver of prosecutorial misconduct, a defendant generally "must make a timely objection, make known the basis of his objection, and ask the trial court to admonish the jury. [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 553 (*Brown*).) "A defendant will be excused from the requirement of making a timely objection and/or a request for an admonition [only] if either would have been futile. [Citation.] In addition, the failure to request that the jury be admonished does not forfeit the issue for appeal if an admonition would not have cured the harm caused by the misconduct or the trial court immediately overrules an objection to alleged misconduct such that the defendant has no

opportunity to make such a request. [Citation.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1201 (*Cole*).)

"When a defendant makes a timely objection to prosecutorial argument [or such objection is excused], the reviewing court must determine first whether misconduct has occurred, keeping in mind that '"[t]he prosecution has broad discretion to state its views as to what the evidence shows and what inferences may be drawn therefrom"' [citation], and that the prosecutor 'may "vigorously argue his case" . . . , "[using] appropriate epithets warranted by the evidence."' [Citation.] Second, if misconduct had occurred, we determine whether it is 'reasonably probable that a result more favorable to the defendant would have occurred' absent the misconduct." (*People v. Welch* (1999) 20 Cal.4th 701, 752-753 (*Welch*).)

With these rules in mind, we turn to Lyons's above contentions on appeal.

B. Analysis

Having reviewed the record in light of Lyons's numerous claims, we note that the record reflects, as the People point out, that Lyons did not object below to any of the prosecutor's questions, comments or argument that he now identifies on appeal as constituting prosecutorial misconduct during trial or closing argument. Nor did he request any curative admonition from the trial court to correct any alleged misconduct by the prosecutor. Because the record fails to disclose any grounds for applying an exception to the general rule requiring both an objection and a request for a curative instruction, Lyons has forfeited his claims of misconduct on appeal. (*Cole, supra,* 33 Cal.4th at p. 1201; *Brown, supra,* 31 Cal.4th at p. 553.)

Moreover, even assuming the issues were preserved for appeal, and some of the comments, questions and argument of the prosecutor amounted to misconduct, we can find no prejudicial misconduct on this record because Lyons has not demonstrated a reasonable likelihood that the jury understood or applied them in an improper manner. (*Morales, supra*, 25 Cal.4th at p. 44.) Although some of the prosecutor's comments and argument that Lyons now complains about were less than artful, and some a bit troubling because they appear at first blush to refer to facts not in evidence or to call upon the emotions of the jurors, when taken in the context of this case and the prosecutor's arguments as a whole, such remarks and argument cannot be shown to have been prejudicial. (*Ibid.*; *Welch, supra*, 20 Cal.4th at pp. 752-753.)

With regard to his claims concerning the numerous jailhouse telephone calls he made to family and friends while he was in custody, Lyons incorrectly characterizes the prosecutor's asking questions of the law enforcement personnel who had listened to those calls about whether Lyons had ever told anyone during them that Reynolds may have committed the killing as improperly and deliberately using Lyons's postarrest silence against him in violation of *Miranda v. Arizona* (1966) 384 U.S. 436. Not only did the evidence show that Lyons had talked to the police after his arrest, and thus had not invoked *Miranda*, but the questions regarding jailhouse conversations and comments on such evidence that Lyons now objects to were essentially elicited in response to Lyons's defense that Reynolds had murdered Olmos. The prosecutor's questions regarding the lack of evidence in those conversations about Reynolds being the shooter in Olmos's death merely went to the weakness in Lyons's third party culpability defense. (See *Frye*,

supra, 18 Cal.4th at p. 973.) The prosecutor's subsequent references to such evidence in closing argument were proper comments on the failure of the defense to introduce evidence and again on the weakness of the defense case. (*Id*. at pp. 972-973.) In no way did such argument improperly suggest Lyons had the burden of proving his innocence as he now asserts. (*People v. Medina* (1995) 11 Cal.4th 694, 755 (*Medina*).)

Lyons's argument that the prosecutor additionally committed misconduct by suggesting in questions to an investigator that there were telephone calls between Lyons and Sanchez after the killing on August 4, 2004 is premised on an incorrect reading of the record, which clearly reflects that although Lyons and Sanchez talked several times before August 4, 2004, they did not talk after that date. Lyons's counsel also clarified such point during cross-examination of the investigator who had listened to the jailhouse phone calls.

As to Lyons's claims that the prosecutor committed misconduct by wrongly insinuating he was involved in witness intimidation and that the defense had a duty to provide information to the prosecution by cross-examining defense witnesses as to why they had not told their stories earlier, no misconduct is shown on this record. Because Reynolds was a reluctant and recanting prosecution witness, it was relevant and admissible to his credibility to be asked about his car having been shot at the week before trial to explain why he was reluctant to testify. (See *Sanchez, supra*, 58 Cal.App.4th at pp. 1449-1450.) Additionally, the fact that a witness may be aware of potentially exculpatory evidence for the defendant but fails to disclose such to the police before trial is relevant to the witness's credibility and a proper subject for cross-examination.

(*People v. Tauber* (1996) 49 Cal.App.4th 518, 524.) So, too, is the fact that witnesses are changing their stories. A prosecutor is entitled to vigorously cross-examine defense witnesses to demonstrate their lack of credibility and motive to fabricate. (Evid. Code, § 780; see *People v. Morris* (1991) 53 Cal.3d 152, 219.) We thus believe Lyons's various claims that the prosecutor disparaged Evans's and Lyons's cousin's testimony by selected remarks or questioning, which suggested they were lying, are meritless on this record.

In addition, Lyons's assertion the prosecutor improperly denigrated the defense, defense counsel and the defense witnesses in closing argument by essentially saying the defense was mostly speculation and based on lies is baseless. Such remarks that highlight the unreasonableness of the defense interpretation of the evidence are fair comment on the deficiencies in the opposing counsel's tactical approach and not improperly aimed at counsel personally. (See *People v. Higgins* (2006) 38 Cal.4th 175, 207; *Medina, supra*, 11 Cal.4th at p. 759.) Regardless, the court instructed the jury with CALCRIM Nos. 222 (Evidence), which explicitly told them that questions and remarks from counsel are not evidence, and 226 (Witnesses), which explained the factors to consider in determining the believability of a witness. We presume the jurors followed such instructions, which would have cured any possible prejudice to Lyons by the alleged disparagement. (*People v. Boyette* (2002) 29 Cal.4th 381, 436 (*Boyette*).)

Although the prosecutor's reference to his own Hawaiian heritage to express his opinion that Lyons did not have a high regard for Olmos's life as well as the prosecutor's characterizing the crime against Olmos as senseless and referring to Olmos's mother's testimony about having to identify Olmos's photograph may have called upon the jurors

sympathies, such fleeting comments cannot be considered prejudicial on this record where Lyons's own counsel told the jury that their sympathies should be with Olmos and her family in this undeserved and senseless killing. Moreover, we presume the jury followed the court's instruction not to let sympathy influence their decision (CALCRIM. No. 200). (*Boyette, supra*, 29 Cal.4th at p. 436.)

Similarly, the prosecutor's brief references to Sanchez's gang murder case as well as comments on Lyons's ethnic background and drug usage cannot be considered prejudicial on this record where Lyons's defense counsel brought out the gang ties and Indian heritage facts during questioning of Reynolds and various other witnesses in an effort to show that Lyons did not have a financial motive to kill Olmos. The prosecutor's questioning about Lyons's drug use and comments on Lyons's ethnic background appear to have been elicited to counter Lyons's defense theory he did not need the rumored bounty on Olmos's head because he, as an Indian, was receiving a large monthly income from the Morongo Band of Mission Indians.

As for the information concerning Sanchez's gang-related murder conviction, such fact, which was introduced by Lyons's defense counsel when questioning Reynolds about his knowledge of the relationship between Lyons and Sanchez who were both members of the same gang, was relevant for explaining Sanchez's status in the gang and the telephone call between Reynolds and Sanchez, which Lyons had admitted in the defense case to show that Reynolds instead of Lyons may have committed the murder because Lyons had not carried out the killing before August 4, 2004 as ordered by Sanchez.

Concerning Lyons's claims that the prosecutor misstated the law of murder and lying in wait, to the extent the prosecutor may have done so, the court fully and correctly instructed the jury with CALCRIM Nos. 500 (Homicide: General Principles), 520 (Murder with Malice Aforethought), 521 (Murder: Degrees), and 728 (Special Circumstances: Lying in Wait) regarding that crime and special circumstance, as well as instructing the jury to disregard statements of counsel that contradict the court's instructions. We presume the jurors followed such instructions. (*Boyette, supra,* 29 Cal.4th at p. 436.)

Likewise, even though the prosecutor may have broadly generalized the discovery rules when suggesting the defense would have brought out any inculpatory DNA evidence that would have pointed to Reynolds as the killer if there had been any, such was proper comment on the failure of the defense to introduce evidence of third party culpability (*Medina, supra*, 11 Cal.4th at p. 755) and it is not reasonably probable that the jury construed such information in an objectionable manner (*Morales, supra*, 25 Cal.4th at p. 44), especially in light of the court instructing the jurors that the attorneys' arguments are not evidence and to follow the court's instructions if counsels' comments on the law conflict with those instructions, which we presume they followed. (*Boyette, supra,* 29 Cal.4th at p. 436.)

With regard to the prosecutor's references in closing argument to Investigator Buompensiero by his nickname "Bump" and as "a faithful law enforcement servant," to his personal opinion that the trajectory that the first bullet "may have been the shot to [Olmos's] neck . . . ," and his use of profanity in summarizing the facts, all of which we

believe were unnecessary, stretch the concept of fair comment on the evidence and do not condone, a timely objection and a request to admonish the jury to disregard each respective reference or comment could have cured any possible harm from such remarks. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1000-1001.) Even though we find these claims of prosecutorial misconduct are waived because an objection and request for admonishment would not have been futile, we are satisfied that each of them was harmless and did not deny Lyons due process. Such complained of references or comments were brief, innocuous and generally followed by references to evidence in the record. The evidence of Lyons's guilt was strong and the jury was instructed that nothing the attorneys said in argument was evidence and to base their decision only on the evidence in the case. Again, we presume the jurors followed the court's instructions. (*Boyette*, *supra*, 29 Cal.4th at p. 436.) Therefore, even if the several statements were improper, on this record, it is not reasonably probable that a more favorable outcome would have occurred in their absence. (*Watson*, *supra*, 46 Cal.2d at p. 836; see *People v. Fields* (1983) 35 Cal.3d 329, 363 [prosecutorial misconduct was harmless error when the evidence of defendant's guilt was overwhelming].)

Moreover, even if we consider these purported errors together, we do not find cumulative reversible error as Lyons contends. As noted above, any error regarding those references or comments would be harmless in light of this record and the totality of the court's instructions and counsel's arguments. (See *People v. Malone* (1988) 47 Cal.3d 1, 56.)

In sum, because Lyons cannot show that it would have been futile on this record to timely object to any of the complained of instances of misconduct and to also request that the jury be admonished to disregard the impropriety, he has forfeited his issues of prosecutorial misconduct on appeal. (*Cole, supra*, 33 Cal.4th at p. 1201; *Brown, supra*, 31 Cal.4th at p. 553.)

IV

ASSERTED INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, Lyons contends he did not receive the effective assistance of counsel to which he is constitutionally entitled as evidenced by his trial counsel's failure to object to the admission of gang evidence or request a limiting instruction for such evidence, by counsel's failure to impeach Reynolds with his prior convictions, by counsel's failure to impeach Investigator Moore, by counsel's failure to contest the DNA evidence or to conduct additional testing, by counsel's failure to request certain instructions or modifications to instructions, and by counsel's failure to object to the prosecutor's various instances of misconduct during closing argument. Lyons's claim of ineffective assistance of counsel fails on this appeal.

"To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings. [Citations.] 'A

reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*Cunningham, supra*, 25 Cal.4th at p. 1003.)

Moreover, "[i]f the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal." (*People v. Kraft* (2000) 23 Cal.4th 978, 1068-1069; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

Here, the record is mostly silent on why Lyons's trial counsel did or did not do any of the acts, which Lyons complains of now on appeal. Lyons retained new counsel for a new trial motion, which raised ineffective assistance of counsel as one of the grounds for a new trial. In support of that ground, new counsel submitted a declaration stating he had asked Lyons's trial counsel for an explanation as to why he did or did not do any of those acts and trial counsel purportedly responded that his office did not do independent DNA testing but that he could not recall why he did or did not do the other acts alleged as ineffective. Without a complete record of the new trial motion, such declaration provides little insight into trial counsel's reasoning for actions or omissions.

Moreover, whether to object to the admission of evidence or to request the admission of evidence are generally tactical decisions which are accorded substantial deference and the failure of which seldom provide grounds for counsel's incompetence. (See *People v. Hayes* (1990) 52 Cal.3d 577, 621.) So too are an attorney's decision not to ask for a limiting instruction, which may have questionable benefits (see *People v. Maury* (2003) 30 Cal.4th 342, 394) and an attorney's decision not to further impeach a witness

whose credibility has been substantially attacked with the fact of a prior conviction (*Hayes, supra,* 52 Cal.3d at pp. 614-615). Additionally, the failure to object to a prosecutor's remarks in closing argument is considered an inherently tactical decision, which rarely will establish ineffective assistance of counsel. (See *Chatman, supra,* 38 Cal.4th at p. 384.)

Because the record reflects the gang evidence was relevant to both the prosecution and defense cases on the issue of motive for the killer, Lyons would be hard pressed to show that his trial counsel's failure to object to the admission of such evidence, counsel's failure to ask for a limiting instruction regarding such evidence or counsel questioning of the investigator about Sanchez ordering the killing were outside the conduct of a reasonably competent attorney. Nor can Lyons show that his trial counsel was ineffective for failing to impeach Reynolds with his prior convictions when Reynolds's credibility had already been thoroughly attacked, for failing to object to or request modifications of the properly given jury instructions, or for failing to object to the prosecutor's closing remarks which, for the most part, would have been overruled. As to those few closing comments that an objection and admonishment would have cured, because they were brief and not prejudicial, trial counsel may have elected to forgo making objections to those so as not to irritate the jury with constant interruptions and being mindful of the court's instructions that counsel's argument is not evidence.

Further, because Lyons had admitted to having sex with Olmos before the murder, there would have been no rational, tactical purpose for his trial counsel to contest the DNA evidence found during the rape kit test on Olmos that matched his DNA. As for the

other DNA evidence, trial counsel may have had a very good reason for not requesting further DNA analysis, which may have conclusively excluded Reynolds as the killer and undercut Lyons's defense theory.

In light of this record, even if there could be no satisfactory explanation for counsel's alleged failures at trial, Lyons has not shown that a different result was reasonably probable absent those purported omissions. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) We therefore reject Lyons's claim of ineffective assistance of counsel on appeal.

DISPOSITION

The judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

McINTYRE, J.